No. 94-1785

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER
vs.
ROBERT F. LUNDY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

On the Merits:

The issue arises when the taxpayer overpays, usually by IRS overwithholding or by payments of estimated tax, the amount of tax owed, where (1) the taxpayer is delayed in filing his return, (2) the IRS mails a Notice of Deficiency to the taxpayer, (3) the taxpayer subsequently files a tax return claiming a refund within three years of the original due date of his return and (4) the taxpayer subsequently files a petition in the Tax Court seeking a redetermination of the asserted deficiency and a refund of his overpayment.

Whether, under these circumstances, the IRS can shorten the statute of limitations on claiming a refund to less than three years by mailing a Notice of Deficiency to a taxpayer more than two but less than three years from the due date of his return.

Procedurally:

Where the record made and arguments presented were much more complete in *Lundy* and where the IRS is signalling its lack of confidence in its position by attempting to have *Richards* (no. 94-1537) heard to the exclusion of the case which created the conflict, should *Lundy* be stayed pending the resolution of *Richards*, when *Lundy* would provide a better vehicle to correctly resolve this important issue of tax procedure?

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-29a) is reported at 45 F.3d 856. The opinion of the Tax Court (Pet. App. 30a-52a) is reported at 65 T.C.M. (CCH) 3011.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1995. The petition for a writ of certiorari was filed on April 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The applicable provisions of sections 6511 and 6512 of the Internal Revenue Code, 26 U.S.C. 6511, 6512 are set forth at Pet. 2-3.

STATEMENT OF FACTS

This statement of facts is based on the record in the Tax Court and the Court of Appeals. All "A" references are to pages in the appendix to Taxpayer's main brief in the Court of Appeals. All "C" references are to Addendum C to the brief.

Federal taxes were withheld from the income of Robert F. Lundy (hereinafter "Taxpayer") for the 1987 taxable year. Like many Americans, it was Taxpayer's custom and practice to permit the petitioner (hereinafter "IRS") to overwithhold from his income so that he never owed the IRS any taxes on April 15th and would, in fact, be due a refund. As a consequence he felt no particular guilt or concern about not filing his return on the initial due date. The IRS, during each taxable year and until April 15 of the following year, was using his money without paying interest to him. (A. 68, 82.)

Taxpayer was led to believe, by the IRS officials with whom he dealt, that he had a full three years in which to file his return. Taxpayer had past experience with the IRS on this very subject. Previously he had filed returns claiming a refund near the end of the three year grace period and had received his refund in full. (A. 69-70, 86.)

During the three year period that commenced April 15, 1988, the date on which Taxpayer's return was initially due, Taxpayer suffered a number of personal and health problems. These facts are detailed in the record.

During the period June 1988 until September 1990, the parties conducted correspondence that is typical of correspondence between a citizen and the IRS. The IRS would send Taxpayer a form letter. Taxpayer would reply with a detailed and considered response. The

IRS would send still another form letter which completely ignored the correspondence of Taxpayer. (A. 75-76.)

The IRS computers generated a Notice of Deficiency to Taxpayer on September 26, 1990. (A. 13, 52.) The IRS claimed that (in addition to the $10,131.11 that was withheld from his wages) he owed $13,806 in taxes, plus $2,192.55 in penalties, plus interest thereon. The letter led Taxpayer to believe that he had only two choices, either to pay the amount demanded or to file a petition in the Tax Court. (A. 77.) Nowhere in the Notice, itself, does the IRS explain a taxpayer's option of filing a complaint in a U.S. District Court or the Court of Federal Claims. (A. 16.)

Taxpayer filed his 1987 tax return and then a petition in the Tax Court in December 1990. (A. 13.) On February 15, 1991 the IRS filed its Answer. This Answer did not raise a limitations defense.

Thereafter, the IRS induced Taxpayer to jump through a number of hoops. Since Taxpayer does not wish to ascribe this behavior on the part of the IRS to pure cruelty, he assumes that each of the public officials with whom he dealt believed that he had a full three years in which to file his tax return and that in fact his tax return was timely filed.

On March 12, 1991, the IRS acknowledged that it had been notified of his petition in the Tax Court. (A. 58.) On March 19, 1991, the IRS sent Taxpayer a letter requesting him to gather, organize, and explain more than 150 pages of documents. (A. 55. 59-60.) On May 15, 1991, the IRS sent Taxpayer a letter stating that in order to receive a refund "the Taxpayer must establish that all requirements of the law had been met." (A. 61.) However, this letter did not raise a limitations defense. The only requirement which Taxpayer was asked to meet was to provide evidentiary support for the deductions that he was claiming on his 1987 return. (A. 61.)

During the examination of Taxpayer's return and the negotiations which followed, involving concessions on both sides, Taxpayer and the IRS agreed that a discrepancy of $778.00 existed between the proposed assessment made pursuant to [Taxpayer's 1987] return of

$6,954.00 and the "corrected income tax liability" of $7,372.00. which was deemed to be a "tax deficiency" even though the IRS admitted that income taxes were withheld from the Taxpayer in 1987 in the amount of $10,131.11. In addition, Taxpayer conceded an "addition to tax" of $369.00. (A. 13, 89-90.)

In a conference call with the Tax Court judge, counsel for the IRS indicated that it was her understanding that a settlement had been reached which involved a refund to the Taxpayer. (A. 56.)

On February 3, 1992, the IRS wrote the Taxpayer the following:

> Amount to be refunded to you if you owe no other obligations $3,537.
>
> You may have already received this check. If not, please allow two weeks for it to be mailed to you unless there are other matters pending which could *postpone* your refund. (emphasis added) (A. 62.)

The IRS filed a Motion to Amend its Answer raising the statute of limitations defense, for the first time, on March 17, 1992 (less than five days before the call of the calendar). This motion was granted over Taxpayer's strenuous objection. (A. 88, 112.) The Taxpayer's check is still being "postponed."

A few months later the Commissioner seemed to have changed her mind once again. In a *Washington Post* report that appeared on October 4, 1992, then Commissioner Shirley B. Peterson said that: "... if you have a refund coming, you may lose it. The IRS estimates that a third of non-filers actually have money coming to them. The law says that a refund must be claimed within three years of the date the return was due. If a refund was not claimed, the government gets to keep it." (C. 1-2)

The Fourth Circuit was asked to take judicial notice of the fact that whenever the IRS seeks publicity about the filing season or about its non-filer program, one of the inducements that is offered is that if a citizen is due a refund, he will receive one if he files a tax

return within three years of the due date of the return from which the refund is calculated. For example, in a press release issued in March 1994, the IRS said: "In particular, the IRS urges those expecting refunds to file before it's too late. Nearly one-quarter of late filers who have sent in prior year returns received funds. Though there is no penalty for filing a refund return after the regular April 15 deadline, a refund is lost forever on a return filed more than three years late. That means refunds for 1990 must be claimed by April 15, 1994." (C-19-20.)

Last year, in a report that ran in the *New York Times* on February 27, 1994, the present Commissioner, Margaret Milner Richardson, said: "More than one-third of the nation's nonfilers are owed refunds. To claim a refund, taxpayers must file a return within three years [of the due date of the return]." (C. 6).

The Court of Appeals for the Fourth Circuit reversed the holding of the Honorable Herbert L. Chabot of the Tax Court that the Taxpayer had overpaid his 1987 income tax, but that his overpayment was not refundable on the ground that the statute of limitations had run on the period in which the Tax Court could make such a determination.

ARGUMENT

I. The Issue in *Lundy* is Substantial and Recurring and the Subject of a Direct Conflict Between the Circuits.

The Court of Appeals correctly held that Taxpayer was entitled to a refund of his overpayment under section 6512(b)(1) and was not barred by the limitation of section 6512(b)(3)(B). However, Taxpayer acknowledges that the decision of the Court of Appeals directly conflicts with that rendered by the Tenth Circuit in *Richards v. Commissioner*, 37 F.3d 587 (10th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3707 (U.S. Mar. 14, 1995) (No. 94-1537) and that the question presented is a recurring one of substantial importance. For reasons set forth in Part III below, Taxpayer asserts that if review is granted in *Richards* and this case, *Lundy v. Commissioner*, 45 F.3d

856 (4th Cir. 1994), *petition for cert. filed*, (U.S. Apr. 30, 1995), *Lundy* should be briefed and argued.

II. Brief Statement on the Merits of the Case.

Section 6511 contains two discrete limitations. Section 6511(a) limits the period during which an administrative claim for refund may be filed with the IRS. Section 6511(b), incorporated by reference in section 6512(b)(3)(B), limits the amount of tax that may be refunded.

Turning first to the limitation on the time for filing a claim contained in section 6511(a), Treas. Reg. § 301.6511(a)-1 provides as follows:

> (1) If a return is filed, a claim for credit or refund of an overpayment must be filed by the taxpayer within 3 years from the time the return was filed or within 2 years from the time the tax was paid, whichever of such periods expires the later.
>
> (2) If no return is filed, the claim for credit or refund of an overpayment must be filed by the taxpayer within 2 years from the time the tax was paid.

Since Taxpayer filed a return, his compliance with the limitation on filing is tested under Treas. Reg. § 301.6511(a)-1. The two requirements in that provision are in the alternative. As Taxpayer did file a return, the alternative which applies to him is clearly the alternative pertaining to a filed return. Taxpayer filed his 1987 tax return on December 28, 1990. The return showing an overpayment also constituted a claim for refund. Treas. Reg. § 301.6402-3(a)(5). Thus, he filed his claim for refund contemporaneously with the return, and, therefore, within three years of the time the return was filed.

Taxpayer, accordingly, has complied with the filing requirements of section 6511(a).

The second limitation, on the amount that can be refunded, is contained in section 6511(b). Since Taxpayer filed his claim for refund within the three-year period described in section 6511(a), the limitation on the amount of the refund applicable to him is contained in section 6511(b)(2)(A). As Treas. Reg. § 301.6511(b)-1(b) states:

> (I) If a return was filed, and a claim is filed within 3 years from the time the return was filed the amount of the credit or refund shall not exceed the portion of the tax paid within the period immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.

Taxpayer filed his return showing an overpayment on December 22, 1990. Since his return constituted a claim for refund, Treas. Reg. § 301.6402-3(a)(5), the claim was filed contemporaneously with the return and therefore was filed within three years of the return. Therefore, section 6511(b)(2)(A) applied to Taxpayer and he was entitled to a refund of any taxes paid in the three-year period preceding the filing of the claim. Since his taxes were deemed paid by section 6513(b)(1) on April 15, 1988, a date less than three years before December 22, 1990, he was entitled to his refund.

Section 6512(b)(3)(B) states that no refund shall be allowed by the Tax Court unless that court determines that such portion was paid within the period of limitation provided in section 6511(b)(2) "if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment."

The net effect of section 6512(b)(3)(B) and section 6511(b) incorporated by reference is that a refund is allowable if on the date the Notice of Deficiency is issued, the taxpayer *could have* filed a timely claim on that date. Where, as here, the Notice of Deficiency precedes the filing of the return/claim for refund, the taxpayer is entitled to his refund if the taxes were paid within three years preceding the mailing of the Notice. The Court of Appeals agreed, stating that the taxpayer should be able to collect a refund due him "if the taxpayer could have filed a return and claimed a refund on the

date the IRS mailed the notice of deficiency." *Lundy* 45 F.3d at 864. This interpretation is supported by the language of the statute, as well as case law, legislative history and well-respected secondary authority submitted by Taxpayer to the Court of Appeals. Since Taxpayer could have filed a timely return on September 26, 1990, the date the notice was issued, he is entitled to his refund.

III. *Lundy* Should be Selected for Briefing and Argument.

If certiorari is granted in *Richards* and *Lundy* Taxpayer submits that *Lundy* should be briefed and argued.[1]

The IRS' petition correctly states that the substantive issue in *Richards* and *Lundy* is identical.[2] The Tenth Circuit in *Richards* concluded that the statute of limitations was only two years and the taxpayer was denied the refund of the taxes she was stipulated to have overpaid. 37 F.3d at 589. The Fourth Circuit in *Lundy* concluded that the statute of limitations was three years and that Taxpayer was entitled to his refund. 45 F.3d at 861. *Richards* and *Lundy* are the only two cases directly in point where a published opinion has been issued by a court of appeals.[3]

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[1]. *Lundy* and *Richards* are procedurally at the same stage so that no delay would result from selecting *Lundy* for briefing and argument.

[2] *See supra* Question Presented on the merits.

[3]. *Davison v. Commissioner*, 9 F.3d 1538 (2d Cir. 1993), *Allen v. Commissioner*, 23 F.3d 406 (6th Cir. 1994), and *Rossman v. Commissioner*, 46 F.3d 1144 (9th Cir. 1995) were reported as table decisions and under the rules of those courts are not precedential and should not be cited as such. *See, e.g.*, 2d Cir. R. 0.23. *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir. 1993), is not in point. Galuska did not file within three years and the court's reference to the two-year limitation was dictum as to that taxpayer, as well as being inconsistent with its own statement that the statute of limitations should be the same in the Tax Court as it would be in the district court. *Id.* at 197. *Miller v. United States*, 38 F.3d 473 (9th Cir. 1994), involved a refund suit in the district court. *Miller* did hold that a two-year rule applied to all taxpayers, regardless of the forum. 38 F.3d at 476. However, as will be pointed out in greater detail in Taxpayer's brief on the merits should this Court grant certiorari, *Miller* relied in part on *Richards*, the correctness of which is the issue to be reviewed by this Court. The courts of appeals in *Richards* and *Miller*

For the four reasons (A through D) stated below, *Lundy* provides a better vehicle than *Richards* by which this Court may gain an insight into and correctly resolve the important issue of law involved in both cases:[4]

A. The *Lundy* Record is Complete While the Record in *Richards* is Meager.

In *Richards*, the Tax Court and Tenth Circuit opinions contain only the most bare-boned stipulated facts: the taxable year, the due date of the return, the date the Notice of Deficiency was issued and the date the taxpayer's return/claim for refund was filed. *See*, e.g., *Richards*, 37 F.3d at 587.

The Fourth Circuit, however, had the benefit in *Lundy* of a record which is extensive. Examining the *Lundy* record would provide this Court with useful insights into the type of circumstances under which the legal issue arises. The trial transcript and the admitted exhibits provide a good illustration of the circumstances of a typical taxpayer who knows he has overpaid his taxes but has been unable to file a timely return. The record in *Lundy* strongly supports Taxpayer's substantive claim that there has existed a longstanding administrative practice of the IRS, which represented a correct application of the statute, to grant refunds to taxpayers who file their returns within three years of the due date. One of Taxpayer's substantive arguments is that such practice has been

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also misinterpreted both the *Galuska* opinion and the statute.

[4]. While the primary consideration in determining which case should be reviewed is that the Supreme Court be as fully-informed as possible, Taxpayer, of course, also has a vital interest in the outcome. If review is granted in both cases but *Lundy* is stayed pending resolution of *Richards*, then Taxpayer's favorable result in the Fourth Circuit is at risk and whether he ever obtains a refund of the overpayment of his 1987 taxes would be dependent on the efforts of Ms. Richards' counsel and the record in that case. Taxpayer respectfully requests that this Court allow counsel who persuaded the Fourth Circuit, on the basis of the record in *Lundy* that he is entitled to a refund of the overpayment of his 1987 taxes, to defend that judgment.

incorporated into law under the legislative reenactment rule. Appellant's Brief at 28, *Lundy* 45 F.3d 856.

The record shows that an IRS appeals officer treated the limitation period as being three years, that the District Counsel treated the period as being three years, and that the IRS sent Taxpayer a letter telling him that the check was in the mail a year after the case was filed in the Tax Court. *Lundy* 45 F.3d at 857. These facts were not before the Tenth Circuit in *Richards*

The IRS' statement of facts in its petition contains a very troubling statement: "Upon review of the information contained in the respondent's untimely return, the Commissioner filed an amended answer [raising the limitations defense.]" Petitioner's petition for writ at 4, *Lundy*. If the Commissioner truly believed that she (and not the mere passage of time) barred Taxpayer's claim for refund when she mailed him a Notice of Deficiency and thereafter he responded by filing a petition in the Tax Court, why did she waste her valuable time reviewing the information on the return? If she truly considered the claim barred by the statute of limitations, the content of the return would be irrelevant. This is a question that cannot be asked of the IRS in *Richards*.

The IRS suggestion in the quoted language is that the IRS could not have raised the limitations defense at the time the original answer was filed because the Commissioner had not yet reviewed the taxpayer's return. Surely, this Court would want to ask the IRS how the need to review the information contained in a return is consistent with its contention that once Taxpayer unwittingly responded to the Notice of Deficiency by filing a petition in the Tax Court, his claim for refund was barred by the statute of limitations. The record in *Richards* will not support this line of inquiry.

If the Commissioner really believed that she could bar the taxpayer from obtaining his refund simply by mailing him a Notice of Deficiency, why did she program her computers to issue checks to taxpayers who claimed refunds on returns filed more than two years but less than three years from the due date of their returns?

Again, this is not a question that this Court may ask the IRS on the record of the *Richards* case.

The Commissioner's belated amendment to her Answer was not made until March 1992, more than a year after issue was joined. Included in the *Lundy* appendix was an article in the *Washington Post* based on an interview with the Commissioner which took place a few months later. Her remarks, as reported, included a statement that taxpayers who have not filed their returns had better get them in within three years, so they could collect their refunds. There is no indication that the Tenth Circuit ever considered the import of the IRS communications to the public through the media regarding the statute of limitations. The Fourth Circuit specifically referred to the fact that IRS publications distributed to the public did not warn[5] taxpayers of its contention that the three-year period for claiming refunds was shortened for taxpayers who receive a Notice of Deficiency before filing a return and then filed a petition in the Tax Court. *Lundy* 45 F.3d at 865. The Fourth Circuit also determined that the IRS did in fact change its practice regarding the statute of limitations in 1991 or 1992. *Id.* at 864-65.

The Fourth Circuit should not be reversed without requiring the IRS to respond to the questions suggested by the record in *Lundy* and to the arguments made to that Court. *Lundy* is the very case which has created the direct conflict between the circuits.

B. The Court of Appeals in *Lundy* was Presented with More Substantial Arguments on the Merits.

Taxpayer in *Lundy* raised several important arguments and policy considerations that were apparently not advanced by the taxpayer in *Richards*. These are the arguments that convinced the Fourth

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[5]. Taxpayer has contended throughout this litigation that the failure to warn taxpayers of the draconian consequences of responding to the invitation contained in the Notice of Deficiency by filing a petition in the Tax Court constitutes a trap. The victims of this trap are almost always average taxpayers who are stunned by the "box car" figures in the Notice of Deficiency asserted to be owed and believe that they have no alternative to filing a petition in the Tax Court.

Circuit to disagree with the Tenth Circuit's decision in *Richards*. Other persuasive arguments were made by Taxpayer that were not specifically discussed in the *Lundy* opinion. This Court might find these arguments persuasive but they cannot be advanced by Ms. Richards.

Some of the arguments and analysis advanced by Taxpayer in *Lundy* which were not addressed by the Tenth Circuit in *Richards* include:

(a) The IRS' position is dependent on finding a "deemed claim" concept not expressly stated in the statute. Taxpayer pointed out to the Court of Appeals that the word 'deemed'" appeared in over 300 Code provisions, including the sections that directly precede and follow section 6512 but not in section 6512 itself. Appellant's Brief at 16, *Lundy* 45 F.3d 856.

The Fourth Circuit agreed that Congress did not inadvertently fail to use the word "deemed" or "consider" in section 6512:[6] "One problem with the Tax Court's reading of § 6512(b)(3)(B) is that the language of the statute does not include the word "deemed." *Lundy* 45 F.3d at 860. Further, "[i]f Congress had intended that a claim for refund filed in the Tax Court shall be deemed to have been filed on the date of the mailing of the notice of deficiency, Congress would have said so explicitly." Id.

(b) There has existed a longstanding administrative practice of the IRS to grant refunds to all taxpayers who file their returns within three years of the due date and, in accordance with the principles enunciated in *Fribourg Navigation Co. v. Commissioner*, 383 U.S. 272, 281-84 (1966), this practice was incorporated into law when Congress, aware of this practice, reenacted the Code. Appellant's Brief at 24-28, *Lundy* 45 F.3d 856.

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[6]. The Code employs "deemed" interchangeably with "considered" which also appears in over 300 Code provisions. Taxpayer notes with bemusement that the IRS has repackaged its old wine in a new bottle. The "deemed claim" has been recharacterized in proceedings before this Court as an "imputed claim." Respondent's Brief at 5-7, *Richards* (No. 94-1537)

(c) The Tax Court failed to construe section 6512(b)(3)(B) in the context of the statutory framework of which it is a part, including section 6512(a) which prohibits a taxpayer who has filed a petition in the Tax Court from filing a refund suit in a United States district court or the Claims Court. Appellant's Brief at 6-9, *Lundy* 45 F.3d 856.

(d) The legislative history indicates that the period in which taxpayers can claim refunds was intended to be symmetrical with the period of time in which the IRS can assess a deficiency: they each have three years. Appellant's Brief at 20-24, *Lundy* 45 F.3d 856.

(e) Under the IRS interpretation, there are potentially 365 statutes of limitations for claiming refunds applied in a manner that is arbitrary, fortuitous and capricious and which bears no rational relationship between the culpability of the taxpayer and the preservation or loss of his or her refund. Appellant's Reply Brief at 16-18, *Lundy* 45 F.3d 856.

(f) *Lundy* set forth an analysis of section 322 of the 1939 Code, predecessor to current sections 6511 and 6512 in issue here. Appellant's Brief at 22-23, *Lundy* 45 F.3d 856; Appellant's Reply Brief at 4-9, *Lundy* 45 F.3d 856. The Fourth Circuit correctly concluded that section 322 of the 1939 Code, predecessor to sections 6511 and 6512, at issue here, was clear in providing a three-year statute of limitations for claiming refunds for all taxpayers. *Lundy* 45 F.3d at 862-63. Further, the legislative history accompanying the 1954 Code made clear that while some changes in language (and the redesignation of section numbers) were made, no substantive changes were intended. *Id.* at 863.

(g) *Lundy* set forth an analysis of the legislative history of the creation of the Tax Court and the extension of refund jurisdiction to that Court. Appellant's Brief at 34, *Lundy* 45 F.3d 856.

(h) Any "deemed claim" should be considered to be in the form of a federal income tax return as required by Treas. Reg. § 301.6402-3(a)(1). Appellant's Brief at 16-18, *Lundy* 45 F.3d 856.

(1) Taxpayer's actual return/claim for refund should supersede any "deemed claim." Appellant's Brief at 18-20, *Lundy* 45 F.3d 856.

These arguments can best be presented and refined by Taxpayer who developed them in the Court of Appeals.

C. *Lundy* can Provide this Court with Thorough Insight into Applicable Principles of Tax Law.

Counsel for Taxpayer are serving *pro bono publico* and therefore, are not subject to the economic constraints which would inhibit a thorough and vigorous representation of Taxpayer's position. The absence of such vigorous advocacy in the past is responsible for the line of Tax Court and courts of appeals decisions which have erroneously accepted the "deemed claim" notion and shortened the statute of limitations.

For fifty years, it has been hornbook law that a taxpayer, who overpays his taxes for a year in which he did not file a tax return, has three years from the due date of that return to file a return on which a refund is claimed. In interviews, press releases, and IRS publications, including a revenue ruling, Rev. Rul. 76-511, 1976-2 C.B. 428, Commissioners of the Internal Revenue have reiterated this proposition.

A few years ago, the IRS disturbed this sleepy little procedural statute by persuading the Tax Court that a late filer has only two years in which to redeem an overpayment by filing a tax return claiming a refund. Even more recently, the IRS has been able to extend its tortured logic to a United States district court. *Miller v. United States*, No. C92-579C, 1992 U.S. Dist. LEXIS 18979 (W.D. Wash. Dec. 1, 1992), *aff'd*, 38 F.3d 473 (9th Cir. 1994). On appeal, the IRS, in its brief to the Ninth Circuit, confessed error but the Court of Appeals affirmed anyway. *Id.* Despite its confession of error to the Ninth Circuit, the IRS now relies on *Miller* in its Petition in *Lundy* at 6-8.

How has the IRS been able to persuade the Tax Court and several courts of appeals to take this erroneous and unfair position? The

IRS obtained a foothold in *pro se* cases. The current spate of cases can be directly traced to two Tax Court cases where the court was deprived of the benefit of vigorous advocacy on behalf of the taxpayer. *Berry v. Commissioner*, 97 T.C. 339 (1991); *Galuska v. Commissioner*, 98 T.C. 661 (1991). The taxpayers in those cases did not file their returns within three years of the due date. This dictum, however, was then applied to taxpayers who had filed their returns within three years of the due date. In those cases, involving relatively small amounts of money, the taxpayers could not afford to pay counsel to fully develop a record, and economics forced counsel to limit the arguments being made.

Mr. Lundy has been represented *pro bono publico* by a tax professor, with the full support and encouragement of his law school, who has been teaching tax law for 20 years, and by an attorney who previously litigated cases for the United States Justice Department for ten years and who also drafted tax laws for three years as a member of the staff of the House Ways and Means Committee. If *Lundy* is selected for briefing and argument, their continued efforts would help to ensure that this Court will have all arguments on behalf of Taxpayer fully focused and presented. Their participation would also help level the playing field for the average taxpayer, offsetting somewhat the significant advantage the IRS enjoys because of the resources it commands.

D. The IRS Interest in having *Lundy* Stayed is Inconsistent with the Supreme Court's Interest in Reaching the Correct Decision.

Finally, it is disingenuous of the IRS to suggest to this Court that *Richards* be selected for review and *Lundy* be stayed because of an impartial application of some unexpressed first-in first-out principle.[7]

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[7]. It should also be noted that although the Court of Appeals decision in *Lundy* preceded the filing of the petition for certiorari in *Richards*, the IRS' petition for certiorari in *Lundy* was delayed until the last moment. The IRS' delay in filing its petition in *Lundy* occurred even though it intended all along to file (Respondent's Brief at 7 n.4, *Richards* (No. 94-1537)) and even though the petition contains nothing more than the text of the statutory provisions in issue, the opinions below

The primary goal of all concerned should be to assist this Court to make the correct decision. That goal will most certainly be achieved if the Court is as fully-informed as possible about the facts and the law. The selection of cases for argument should be made on this basis, not on the happenstance of first filing.

The IRS selection of *Richards* over *Lundy* for review reflects the interests of the advocate: it furthers its goal of winning. However, the IRS' quest for victory can be inconsistent with the Court's interest in arriving at a fully-informed decision if, as here, the IRS argues that the more developed case be excluded from consideration because it was not the first filed.

CONCLUSION

Taxpayer contends that the decision of the Fourth Circuit was correct and that he is entitled to a refund of the overpayment of his 1987 taxes. However, Taxpayer acknowledges that there is a direct conflict between the courts of appeals and that the issue involved is both important and recurring. If this court should grant certiorari in *Richards* and *Lundy*, *Lundy* should be briefed and argued.

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and a request to stay *Lundy* pending the resolution of *Richards* This delay could have the effect of precluding consideration of *Lundy* which is the more developed case.

Counsel for Taxpayer also notes that counsel for taxpayer in *Richards* stated that he was personally advised of the Fourth Circuit's decision in *Lundy* by the attorney who represented the IRS in *Richards* and *Lundy* This courtesy call would have occurred at a time when counsel for Ms. Richards and counsel for the IRS no longer had any official business to discuss in connection with the *Richards* case.

The IRS' delay in filing its petition in *Lundy* also forced Taxpayer to file this Brief in response to the IRS petition in far less time than that permitted under the rules in order to protect his interests. Had he not done so, this Court would have discussed *Richards* in conference without considering the importance of *Lundy* as a better vehicle for correctly resolving the conflict between the circuits.